WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE	October 31, 2022
TO	Joint Transportation, Highways and Military Affairs Interim Committee
FROM	Heather N. Jarvis, LSO Attorney
SUBJECT	Use of public road rights-of-way in Wyoming and other states

This memorandum is intended to provide the Joint Transportation, Highways and Military Affairs Interim Committee with information on Wyoming and other states' authorizations for and uses of public road rights-of-way in addition to motorized travel. Additionally, this memorandum is intended to discuss use of rights-of-way for a public purpose and whether a private entity may use a public right-of-way.

State has authority to obtain, use, manage, and dispose of rights-of-way

The State of Wyoming has the power to grant rights-of-way for public improvements on state lands.[1] The Wyoming Transportation Commission is authorized to secure as property of the State the rights-of-way necessary to comprise the state highway system.[2] To construct, maintain, and supervise the public highways of the State, the Wyoming Department of Transportation is authorized to acquire, hold, manage, develop, improve, operate, and maintain real property for any necessary public purpose.[3] Even broader, the Department may "[s}ell, exchange, abandon, relinquish or otherwise dispose of real property including land, water and improvements for any necessary purpose."[4] Implicit in the authorization to sell, exchange, or otherwise dispose of real property is the power to receive adequate consideration for the "necessary purpose" for which the land is disposed. In acquiring rights-of-way for public roads, the Transportation Commission shall only use eminent domain to obtain the rights-of-way where additional property is needed for deposits of road building materials or waste materials, embankments, excavations, maintenance, parking facilities, roadside rest areas, and scenic roadside areas, and only if the property for those purposes is immediately adjacent to the highway right-of-way.[5]

[1] See e.g. *Ross v. Trs. of Univ.*, 30 Wyo. 433, 441, 222 P. 3, 6 (1924) (confirming this power on state lands as well as state trust lands).
[2] W.S. 24-1-103 and 24-2-109.
[3] W.S. 24-2-102(a)(i).
[4] W.S. 24-2-102(a)(ii).
[5] W.S. 24-2-102(b). Exercising eminent domain requires a public use, and procedures and requirements are provided for in the Wyoming Eminent Domain Act at W.S. 1-26-501 through 1-26-817.

Use of right-of-way for a public purpose

Once the State has obtained the right-of-way for a public road, the right-of-way may also be used for a public purpose or any necessary purpose.[6] Public purpose as applied to use of a public road right-of-way is examined in a 2004 Wyoming Supreme Court case, which is also instructive on several states' uses of state rights-of-way. The case, *Box L Corp. v. Teton County*, examines whether Teton County was within its rights to enter into an agreement allowing a private utility company to use a public road easement the County had obtained from the appellants, owners of the lands containing the road.[7] The agreement in *Box L Corp. v. Teton County* granted right-of-way to lay out, construct, operate and maintain a road "for the use of the public" and included consideration in the form of a fee for the right to use the right-of-way.[8] In its discussion, the Wyoming Supreme Court cites cases from Idaho, Washington, and Nebraska to support its holding that:

> a proposed use of a public easement may be in the public interest despite the fact that a private entity intends to construct the project and despite the fact that a private entity may reap some benefit from the project. Similarly, a proposed use of a public road easement does not have to be intended to serve all the members of the general public to be in the public interest and to fit within the purpose of a public road easement.[9]

The *Box L Corp.* Court considered a Washington State public easement case compelling for its analysis of public use of and public interest in an easement as well as whether a private corporation's use may be in the public interest.[10] This case, from Washington, describes streets being established and maintained for public travel, and:

> In addition to this primary purpose, however, there are numerous other purposes for which the public ways may be used, such as for watermains, gas pipes, telephone and telegraph lines, etc. These are termed secondary uses and are subordinate to, and permissible only when not inconsistent with, the primary object of the highways. … … There is no contention that [the statute at issue] is unconstitutional, but it is asserted by the appellants that the franchise with which we are here concerned does not meet the terms of the statute. The point urged by them is that, as a matter of law, a franchise issued to a private corporation not intending to serve the general

[6] W.S. 24-2-102.
[7] *Box L Corp. v. Teton Cty.*, 2004 WY 75, 92 P.3d 811. Note that establishment of county roads is found under W.S. 24-1-101 and 24-3-101 through 24-3-127.
[8] *Box L Corp. v. Teton Cty.*, 2004 WY 75, 92 P.3d 811, 814.
[9] *Box L Corp. v. Teton Cty.*, 2004 WY 75, 92 P.3d 811, 819.
[10] *State ex rel. York v. Board of Comm'rs of Walla Walla County*, 28 Wn. 2d 891, 184 P.2d 577, 581-84 (1947).

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> public cannot be "for the public interest." They insist that "public interest" is "public use," and no more.
> …
> We are of the further opinion that it cannot be held, as a matter of law, that a co-operative association engaged in the business of generating, purchasing, acquiring, selling, and distributing electric power for the benefit of its members is not acting for the public interest. … …
>
> I. The fact that highways are dedicated to public use implies that they must be maintained primarily as public ways; and "* **these public ways must be kept free from obstructions, nuisances, or unreasonable encroachments which destroy, in whole or in part, or materially impair, their use as public thoroughfares." …
>
> II. Subject to this primary use, highways may be put to any of the numerous incidental uses suitable to public thoroughfares …. The public easement "* **includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities which the advance of civilization may render suitable for a highway." …
>
> "The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to [by abutting owners] when they are only such as are incident to a reasonable use under impartial regulations."[11]

Private entity use of right-of-way may be in the public interest

In reaching the holding in *Box L Corp.*, the Wyoming Supreme Court indicated that it found an Idaho case, *Bentel v. County of Bannock*,[12] "particularly instructive because it holds not only that a public road easement may be used for an underground sewer line, but also that such right is not defeated solely because the sewer line is to be constructed by a private entity."[13] The Wyoming Supreme Court referred to the Idaho court's analysis determining that a private entity's use of a right-of-way may be in the public interest:

[11] *State ex rel. York v. Board of Comm'rs of Walla Walla County*, 28 Wn. 2d 891, 184 P.2d 577, 581-84 (1947) (quoting 4 McQuillin, *Municipal Corporations* § 1437 (2nd ed.); *McCullough v. Interstate Power & Light Co.*, 163 Wash. 147, 300 P. 165, 166 (1931); and *Omaha & Council Bluffs St. Ry. Co. v. City of Omaha*, 114 Neb. 483, 208 N.W. 123, 124 (1926)).

[12] *Bentel v. County of Bannock*, 104 Idaho 130, 656 P.2d 1383 (1983).

[13] *Box L Corp. v. Teton Cty.*, 2004 WY 75, 92 P.3d 811, 817.

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> It is clear from the contract that the City of Pocatello will derive a direct and substantial benefit from construction of the pipeline, and that public benefit makes construction of the pipeline allowable within the scope of the county's public easement. Even were this not so, the county is not precluded from believing that the pipeline is in the public interest. The pipeline will directly produce local environmental benefits by reducing the amount of effluent discharged by Simplot into the Portneuf River. Not only does common sense lead us to recognize this as beneficial, but we note that both Congress and our state legislature have found such reductions in effluent discharge to be in the public interest. …[T]he fact that a private party may reap a special benefit from governmental action does not of itself militate against recognizing that the public interest is being served.[14]

Authorized uses and Wyoming statutes

Wyoming statutes explicitly authorize several rights-of-way uses. Under W.S. 1-26-813, persons are authorized to use a public road right-of-way under "for the purpose of constructing, maintaining and operating a public utility or communications company" and "may set their fixtures and facilities along, across or under any of the public roads, streets and waters of this state in such manner as not to inconvenience the public in their use" upon gaining permission from the authority controlling the right-of-way.[15]

In addition to public utilities and communications, other public roads rights-of-way uses under Wyoming statutes include that off road recreational vehicles may be operated on designated public road rights-of-way,[16] snowmobiles may be operated within the rights-of-way,[17] various uses for water rights-of-way,[18] and provisions for railroads and mining companies.[19]

The Wyoming Supreme Court in *State v. Homar* held affirmatively that public road easements may be used for purposes other than road travel. In that case, a turnout for a public transportation system built on a right-of-way was a legitimate use of the

[14] *Bentel v. Bannock County*, 104 Idaho 130, 656 P.2d 1383, 1387-88 (1983) (citing *City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, Inc.*, 99 Ariz. 270, 408 P.2d 818, 823 (1965); *McTaggart v. Montana Power Co.*, 184 Mont. 329, 602 P.2d 992, 996 (1979); *Town of Steilacoom v. Thompson*, 69 Wn. 2d 705, 419 P.2d 989, 992 (1966); and *State ex rel. York v. Board of Comm'rs of Walla Walla County*, 28 Wn. 2d 891, 184 P.2d 577, 583 (1947)).
[15] W.S. 1-26-813.
[16] W.S. 31-5-1601.
[17] W.S. 31-5-801.
[18] E.g. W.S. 1-26-802, 15-7-706, 17-12-102.
[19] E.g. W.S. 30-1-128, 37-9-203.

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easement.[20] The Court cited to W.S. 1-26-813 and West Virginia, Idaho, and Alaska cases as it explained:

> The manner in which the easement is used does not become frozen at the time of grant. An easement for a road or a highway does not limit its use to the movement of vehicles. Uses related to traffic movement are within the scope of the easement. The grant of a public road easement embraces every reasonable method of travel over, under and along the right-of-way. Thus, the running of power and telephone lines above the ground and pipelines underneath do not increase the burden on the servient estate and are permissible uses. The reason underlying this policy is that the services and products these conveyances provide may change from earlier times when they were provided by messengers and freight wagons. Change was contemplated and must be accommodated in an advancing society. Thus, overhead transmission lines and underground pipelines are simply technologically advanced adaptations of traditional highway uses.
>
> The operation of a public mass transit system is also within the realm of permissible uses of a road easement. Indeed, like pipelines and transmission lines, the bus line provides an advancement in the more efficient use of transportation resources.[21]

Other states' authorizations and uses for rights-of-way[22]

The Utah Department of Transportation has used public-private partnerships to share and trade fiber-optic systems. As the state builds fiber corridors, they construct excess capacity, which is then traded to private telecommunications companies for capacity along their corridors. The state also makes highway rights-of-way available, for a trade value, to these private entities. Through these partnerships, the state has leveraged 1,000 miles of state-built fiber to access an additional 1,700 miles of private fiber, often to very rural areas of the state, an added value of over $55 million.[23]

Appendix A contains an article describing several legal issues with trails. The list below refers to several other states' statutes providing for private sector access to rights-of-way for trails:

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[20] *State v. Homar*, 798 P.2d 824, 826 (Wyo. 1990).

[21] *State v. Homar*, 798 P.2d 824, 826 (Wyo. 1990) (citing W.S. 1-26-813; *Bard Ranch Co. v. Weber*, 557 P.2d 722, 731 (Wyo. 1976); *Herold v. Hughes*, 141 W.Va. 182, 90 S.E.2d 451, 458 (1955); *Bentel v. County of Bannock*, 104 Idaho 130, 656 P.2d 1383 (1983); *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127, 129 (Alaska 1983)).

[22] Thank you to the National Conference of State Legislatures for collecting this information.

[23] See more information here: https://www.udot.utah.gov/connect/business/its-interstate-lighting/ , here: https://www.fhwa.dot.gov/ipd/project_profiles/ut_big_cottonwood_canyon_fiberoptic.aspx , and here: https://www.fhwa.dot.gov/utilities/pdf/hif22040.pdf.

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Connecticut
Conn. Gen. Stat. §23-100
Definitions (Greenways and Bikeways)

New Jersey
N.J. Stat. §13:8-39
Development and maintenance of trails; written cooperative agreements

Ohio
Ohio Rev. Code §1519.02
Trail right-of-way acquisition, improvement, maintenance, and supervision

Oregon
Or. Rev. Stat. §§390.968 to 390.971
Rights of way for trails
Rights of way; duty and authority of department

Virginia
Va. Code §10.1-203
Establishment, protection and maintenance of Appalachian Trail

Washington
Wash. Rev. Code §47.30.020
Facilities for nonmotorized traffic – Joint usage of rights-of-way

Appendix B contains a memo listing several other states' statutes providing for private sector access to rights-of-way for pipelines and utilities.

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Legal Issues Associated with Trails: An Introduction

Private land owners, public land managers, land trusts, trail advocates, and others must be aware of the legal responsibilities associated with developing and maintaining trails. Although risks and responsibilities vary widely depending on the location and type of use, this topic has been addressed in all 50 states and is well-studied. Knowledge of basic legal principles can guide project planning and highlight areas that merit particular attention.

This paper describes:

1) the types of laws that are relevant to landowners and land managers considering recreational use on private and public lands;

2) the general types of legal exposure;

3) ways to reduce risk; and

4) sources for additional information.

Recreational use statutes grant limited liability to landowners who permit access for recreational purposes. Recreational use statutes and associated laws vary significantly from state to state in scope and content. Therefore, landowners and groups considering the liability that may be associated with trail development should consider the elements of the recreational use statute in their state.

The links at the end of this paper contain online lists of the recreational use statutes of each state. Headwaters Economics also has several online resources to help describe benefits from trails.

Table of Contents

This series offers a succinct review of common benefits identified in the 130+ studies in Headwaters Economics' free, online, searchable **Trails Benefits Library.**

Relevant Laws

This section describes common elements of the laws related to trails and public and private landowners, situations when those laws apply, and situations when they do not apply.

Laws Governing Private Landowners

To encourage landowners to open private lands to the public for recreation, all state legislatures have adopted *recreational use statutes* that provide a shield from liability for landowners who allow public access to trails across their land.

In broad terms, recreational use statutes include any outdoor activity undertaken for the purpose of exercise, relaxation, or pleasure.[1] Recreational use statutes make it less likely that a property owner will be liable for damages in the case of injury.[2] Recreational use statutes also may provide a means by which landowners may be compensated for damages due to vandalism or trespassing. To discourage vandalism, landowners should post signs specifically stating that all acts of vandalism are prohibited and that violators will be prosecuted to the fullest extent of the law.

Recreational use statutes, however, do not relieve the landowner from all responsibilities to recreational trail users. For example, landowners are not required to prevent harm to recreational users, but they must not engage in willful or malicious conduct. Generally, under the terms of a recreational use statute, a landowner has a reduced duty of care and a reduced duty to warn of dangerous conditions on the trail. However, recreational use statutes retain landowner liability for willful or malicious actions (see the "Limitations of Recreational Use Statutes" section for more details).

In general, recreational use statutes apply to protect a landowner from liability to entrants on the land for recreational purposes, unless the landowner charges a fee for entry or forbids entry. (See the "When Do Recreational Use Statutes Apply?" section for more details).

Common Elements to Recreational Use Statutes

Certain elements are common to all recreational use statutes.

First, those claiming liability protection under a recreational use statute must have a legal interest in the real property, either as owners, lessees, tenants, occupants, or easement holders. Recreational use statutes vary in who is considered an "owner" for purposes of liability protection. For example, both private landowners who provide a trail easement over their land and private landowners who own land adjacent to a trail corridor are protected by recreational use statutes.

Second, a trail user's harm must result from the use of the premises for recreation. Recreational use statutes are not designed to limit liability for injury to entrants who do not come on the land for recreation.

Third, in most states the protection offered by a recreational use statute only extends to those landowners who do not charge or otherwise require compensation for the recreational use of a trail across their properties. In other words, landowners who charge a fee to access their lands usually are not protected by the state's recreational use statute.

When Do Recreational Use Statutes Apply?

In general, the more open the access provided by the landowner, the more likely the landowner is to benefit from the protection afforded by a recreational use statute. For the most part, landowners receive liability protection under a recreational use statute only if they make their land open to the public at large and not just to certain or specified individuals, such as neighbors or a specific hiking club.

For example, the Illinois recreational use statute did not apply to a personal injury action against a lakeside property association brought by an injured guest of one of the association's members. In this case, the lake was not open to the public but only to association members and their guests so the property association was not protected.[3]

Some states' recreational use statutes single out trails for special landowner protection from liability, whether the trails cross private or public land. In California, public entities are not liable for injuries caused by the condition of any unpaved road that provides access to hiking or riding, any trail used for those purposes, or any paved trail or

1 In determining whether a use was recreational and therefore whether the landowner is protected by a recreational use statute, courts will consider the nature and scope of activities occurring on the land and the reason the affected person was present. Any such determination by a court will be considered in light of the underlying purpose of recreational use statutes, which is to induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come on their property to pursue specified activities.

2 Recreational use statutes function by altering the "duty of care" owed by a landowner to recreational trail users.

3 *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 711 N.E. 2d 773 (1999), as modified on denial of rehearing, (May 19, 1999) and appeal denied, 185 Ill. 2d 617 (1999).

easement granted to a public entity.[4] Florida adopted a trails act for a statewide system of trails for recreational and conservation purposes and specifically limits the liability of private landowners whose lands are designated as part of the statewide trail system.

Recreational use statutes do not apply to people who have been invited or encouraged to use private property, known as "common law invitees" or "invited guests."[5] Landowners are held to a higher liability standard for this user group. To determine whether a landowner is protected by a recreational use statute, laws ask not only whether a trail is open to the public, but also whether the landowner "desired, induced, encouraged or expected" others to enter the land sufficiently to make them common law invitees.

The landowner's intent matters: If he or she permitted a person to enter but did not explicitly desire or invite a person to enter, the person is not considered a "common law invitee" or "invited guest" and therefore generally will be protected under the recreational use statute. Signage can help a landowner demonstrate his or her intent toward users.

For example, in New York a country club neither encouraged nor discouraged the winter use of its golf course for cross country skiing and tobogganing, did not advertise the availability of its golf course for winter use, did not inspect or maintain the golf course in winter, and did not receive fees or any other consideration for the use of the golf course for winter recreation. Therefore, the state's recreational use act applied and protected the country club from liability for injuries sustained by an entrant tobogganing there.[6] Had the country club promoted winter use it might not have been protected by the state's recreational use act.

Depending on the applicable statute and how it has been interpreted in a given state, landowners of residential or developed areas may not have the same limited liability for injuries sustained on their land as landowners of rural, undeveloped land. Recreational use statutes are most likely to protect landowners from liability when it would be unreasonable to expect the landholder to maintain supervision over the property in question. Owners of large rural lands often have difficulty in defending their lands from trespassers or in taking precautions to render the lands safe for persons entering for recreation. Characteristics such as size, naturalness, primary and secondary uses of the land, and remoteness from populated areas are considered in determining what properties are to receive protection under a recreational use statute.

The definition of the "premises" protected by recreational use statutes is often interpreted to include paved or unpaved multi-use trails, and special purpose roads or trails not open to automotive use by the public. Some statutes provide immunity only for recreational use of unimproved trails and not paved trails.

Limitations of Recreational Use Statutes

Recreational use statutes do not grant landowners absolute immunity from liability. Landowners are not immune from liability where there is a willful, wanton, or malicious failure to warn or guard against dangerous conditions.

Whether a landowner acted willfully or maliciously is related to: 1) the foreseeability of a danger and the probability and gravity of harm from it; 2) knowledge of the danger; and 3) the actions taken by the landowner in view of the first two factors. The extent of liability protection of each state's recreational use statute is uniquely a matter of state law.

For example, in Rhode Island a trail called the Cliff Walk is a public easement over private land. A number of private individuals own the land along which the Cliff Walk runs. The Supreme Court of Rhode Island found a public easement is the responsibility of the governmental agency that undertakes the control and maintenance of the easement, but that a private landowner who owns the land abutting and running under the easement has no duty to warn, construct fences, or take any precautions about the trail.

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4 *Armenio v. County of San Mateo*, 28 Cal. App. 4th 413 (1994).

5 A licensee is someone who is invited or tolerated on the land, but who does not bestow any economic benefit upon the landowner. A trespasser is someone who comes upon the land of another without the consent of the landowner or occupier. An invitee is someone who comes upon the land bestowing an economic benefit, such as a business customer.

6 *Dean v. Glens Falls Country Club, Inc*., 170 A.D. 3d 798, 566 N.Y. 2d 104, 105 (1991)

Therefore, when a person walking along the Cliff Walk trail fell off the cliff and was injured, Rhode Island's Supreme Court determined that because the private landowners had no control over the public easement over private land, they had no responsibility to those who came upon it. On the other hand, there was evidence the city that had undertaken control and maintenance of the trail knew about dangerous erosion at the Cliff Walk and failed to either guard against these dangers or post warnings. The court found that under the willful and malicious exception to the recreational use statute the city had a responsibility to take reasonable steps to warn and shield unsuspecting visitors against known and grave dangers in some reasonable manner.[7]

Another possible limitation to the protections afforded by recreational use statutes concerns child trail users. Even if a child is trespassing, some states may require a higher duty of care toward children under the "attractive nuisance" doctrine which requires landowners to keep those parts of their land where they know children are more likely to be present free from artificial objects that involve an unreasonable risk to children. This includes heavy construction equipment or man-made holes or trenches.

Another limitation is if a charge is imposed in return for permission to go on the land of another. In most states the recreational use statute then does not apply and the landowner is liable for injuries incurred by those who paid a fee to enter.

Laws Governing Public Lands

Federal and state governments have Tort Claims Acts that outline tort liability and immunity for public lands.[8] The interplay between state Tort Claims Acts and recreational use statutes varies significantly from state to state.

Several courts have held that since the intent of recreational use statutes is to encourage private landowners to open their lands to the public for outdoor recreational activities, the statutes do not provide immunity to governments. However, other states explicitly extend immunity to public entities on the theory that the burden of putting public property in a safe condition and of defending claims for injuries would otherwise cause many public entities to close public properties to recreational use.[9] Recreational use statutes in thirty-five states have been interpreted to apply to public lands.[10] (For state-specific information, see the "More Information" section.)

Types of Risks

Personal Injury

All fifty states have enacted a recreational use statute that protects landowners from liability for injuries to recreational users of their property, although usually only if users are not charged to access the property. The statutes provide relief not only to the outright owners of property but also to tenants occupying the property and others with control over the property. The protection arises regardless of whether the landowner posts the property to prevent trespassing. The protection afforded by recreational use statutes does not extend to willful or wanton misconduct by landowners.

Vandalism

Recreational use statutes may include redress for destruction, vandalism, or littering by recreational users, as well as for failure to leave gates and fences in the condition in which they were found. Recreational trail users who engage in these prohibited behaviors may be subject to fines and civil actions by the landowner.

7 *Berman v. Sitrin*, 991 A.2d 1038 (R.I. 2010)

8 Tort law is a collection of civil law remedies that allow a person to recover damages, usually money, for injury caused by the actions, omissions, or statements of another, in such circumstances that the latter was in breach of a duty or obligation imposed by the law.

9 *Armenio v. County of San Mateo*, 28 Cal. App. 4th 413 (1994)

10 Michael S. Carroll, Dan Connaughton, & J.O. Spengler, Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation, 17 J. Legal Aspects Of Sport 163, 172 (2007).

Landowners can manage the risk of vandalism from recreational users by installing signs, fencing, cameras, and gates. Signs prohibiting littering should be conspicuously posted.

Trespassing Off Trails

Landowners can make it clear that trail users are not invited onto adjoining land by posting "no trespassing" signs, planting hedges, or installing fences. It is illegal for persons to trespass on properly posted private lands; whether the land is posted or not, trespassers must leave upon the request of the landowner.

State laws dealing with posting against trespassing and access to private land are varied and complex. Many states have "posting statutes" that provide if a landowner has not marked the adjoining fields or woods in a way that informs passersby they are unwelcome, he cannot object if members of the public enter onto the property.[11] In other states, failure to post is insufficient to imply consent to enter but must be considered along with whether the landowner customarily and notoriously allows or acquiesces to public recreational use.

Each state's posting statute has specific requirements for the number of no trespassing signs that must be posted, what they must say, their height off the ground, and even their color. Landowners or others in possession or control of lands crossed by trails should consider the type and number of signs the landowner should place on the premises to best take advantage of the protection from liability afforded by the state's recreational use statute.

For example, if a landowner wants to deny public access to his land through the posting of "keep out" signs, he may find a court later will determine the recreational use statute was inapplicable because the land was apparently not open to the public. On the other hand, if a landowner fails to post warning signs against a dangerous condition, the landowner may be liable for a willful or malicious failure to warn. Thus, depending on the applicable recreational use statute, it may be appropriate to post signs that warn of danger but do not bar entry, such as one advising to "enter at your own risk."

Licenses for Trail Use and Maintenance

Another aspect of potential liability concerns people specially authorized to use and/or maintain trails. Often such authorization occurs under a license from the landowner. A trail license is a formal agreement providing the entrant permission to use the land in a specified manner. It allows the landowner to impose limitations on use and to determine trail management responsibilities. Trail licenses can be revoked at any time and do not bind subsequent landowners.

Recreational use statutes vary with respect to whether trail clubs that maintain and groom the trails they are licensed to use are granted immunity from liability. For example, the Wisconsin Supreme Court held that a snowmobile club that was actively engaged in ongoing trail maintenance was immune from liability as an "occupier'" of the land, even without having legal title, dominion, or tenancy.[12] In New York, a grounds maintenance company was considered an "occupant" of a private college campus when it was charged with maintaining a campus bicycle trail, and thus was immune from personal injury action under the state's recreational use statute.[13] By comparison, in New Hampshire a non-profit snowmobile club that maintained a trail, and the operator of the club's grooming machine, were not "occupants" under that state's recreational use statute and thus were not immune from liability because they had neither the ability nor authority to make land available for recreational purposes but merely had the ability and authority to make that land more easily usable than it might otherwise have been.[14]

Trail Easements and Liability

A trail easement authorizes its holder to use the trail property for particular purposes. A landowner can specify conditions of use in the easement such as what types of recreation are allowed on the trail and who may have access.

11 *Oliver v. United States*, 466 U.S. 170, 193-94 (1984) (Marshall, J., dissenting)
12 *Held v. Ackerville Snowmobile Club, Inc*., 2007 WI App 43, 300 Wis. 2d 498 (2007)
13 *Weller v. Colleges of Senecas*, 261 A.D.2d 852, 689 N.Y.S.2d 588 (N.Y. 1999)
14 *Kenison v. Dubois*, 152 N.H. 448, 879 A.2d 1161 (N.H. 2005)

An easement might allow hiking but not bicycling, or bicycling but not horseback riding; the allowed uses are whatever the parties put in the agreement. A typical trail easement includes language such as the following:

> "Grantor voluntarily grants and conveys to Grantee and to the General Public as a gift without consideration, an easement to pass and repass upon said parcel on foot for the purposes of fishing, hiking, or nature study and the Grantor also grants to the Grantee an easement for the purposes of clearing, marking and maintaining the trails. This Trail Easement to run with the land in perpetuity as defined by [State] law for the Purposes outlined below. This Easement shall be implemented by limiting and restricting the use and management of the Trail in accordance with the provisions described herein."[15]

If no charge is made for entry and in the absence of willful or malicious conduct, landowners who grant trail easements should be less concerned about any additional public liability from use of the trail. Landowners who grant an easement or a license to a trail club or government entity remain under the protection of the recreational use statute.[16]

Risk Reduction Strategies

Recreational use statutes limit liability, but do not prevent lawsuits by trail users. Trail managers can minimize their exposure to lawsuits through careful planning, awareness of hazardous conditions, and signage. They can transfer some of the risk via liability insurance and waivers. More hazardous activities may require additional considerations, which are discussed at the end of this section.

Trail Design and Monitoring

Trail managers can eliminate or control risk by good trail design, marking hazards, and closing trails. To this end, managers should develop comprehensive, written standards for trail-building and maintenance and strictly adhere to them. Properly designed and maintained trails developed and built in accordance with recognized standards and best practices may benefit from immunities under state law.

The best approach to risk management involves identifying and controlling situations and activities that will cause injury, marking hazards, and closing trails in dangerous situations. Trail maintenance and trail building only should be done or supervised by those who are trained in trail construction. The trail should be designed to avoid obvious dangers such as stationary heavy equipment, livestock, and cliffs.

Trail managers should conduct regular audits of trail hazards with an emphasis on man-made structures, and should keep careful records of the trail audits. The agency should train volunteers in regularly inspecting and documenting the trail's status. A paper record of audits and corrective measures should be retained forever as protection against liability.

Hazardous Trail Conditions

Trail managers should consider and warn against key hazards including sloped or uneven ground, seasonal hunting activity, seasonal pesticide application on neighboring fields, poisonous plants, overhanging boughs, livestock, stationary heavy equipment, and cliffs. Any hazard that risks serious damage requires active trail management. Bollards, or short thick posts, should be placed at trail access points to prevent motorized access. Managing agencies can minimize the impact of accidents by placing first aid posts and rescue equipment along the trail, providing directions to nearby emergency rooms on trail entrance signs, and developing emergency plans.

15 Massachusetts Executive Office of Energy and Environmental Affairs, *The Massachusetts Conservation Restriction Handbook*, Sampler, Public Access (1991). http://atfiles.org/files/pdf/MAconsrestrict08.pdf Accessed August 9, 2016.

16 For example, see *Berman v. Sitrin*, 991 A.2d 1038, (R.I. 2010), and *Stephen F. Austin State University v. Flynn*, 228 S.W.3d 653 (Tex. 2007), which hold that a landowner who dedicated a public easement for use as a recreational trail retained ownership of the underlying land, and, as the owner of the property, was protected by the recreational use statute.

Signage

Landowners and trail management agencies can minimize exposure to risk from more dangerous trail uses through posting information and hazard signs on the trail. Clear signs and physical barriers are the best mechanisms for preventing dangerous trail uses. Information signs let users know what uses are prohibited, while hazard signs help minimize risk for all trail users.

Trail information signs should be posted at trail entrances to make clear the status of the trail and note what types of use are permitted or prohibited. Such signs provide notice that to access the trail beyond the sign is to agree *de facto* to an unsigned contract to trail use and its hazards.

It is essential for the information sign to be clear to recreational trail users. A combination of words and graphics may be used to explain permitted and non-permitted uses and behaviors and to identify known hazards. Clear signs help transfer liability to the trail user in the event of a mishap.

Emergency Planning

Trail managers should keep in close contact with landowners and municipal officials to share information about activities or developments that may affect trail use. To reduce the severity of any mishaps that may occur, trail managers should develop and implement an emergency plan that includes making sure local emergency responders are familiar with trail maps, know how to locate and access users on the trail system, and have access to locked gates.

Insurance

General liability insurance is a key part of any trail risk management program. Insurance transfers liability for financial losses from the trail managing agency to the insurer. Insurance is necessary to help cover both legal costs and damages awards in the case of injury litigation. Thus trail managers or landowners may incur costs to defend against lawsuits. Such costs are the principal reason for purchasing liability insurance.

Where a trail is owned or operated by a public entity, the trail liability insurance may be included in the public entity's overall insurance policy. Private trail managing agencies can obtain either umbrella policies or trail-specific policies.

Waivers

Like liability insurance, waivers help to transfer responsibility for injuries and financial losses from landowner or manager to trail user.

For organized hikes or rides or for trail maintenance work parties, all participants should be asked to read and sign a "waiver and assumption of risk" form. The signatures are only valid for those 18 years of age or older, so parents and guardians should be made to sign on the behalf of children under the age of 18. The signed waiver form shifts liability from the landowner, trail club, or other easement holder to the trail user and provides a list of participants who, in case of mishap, can serve as witnesses.

Higher Risk Activities

Some trail uses, such as snowmobiling, are more dangerous and therefore pose a higher risk of liability than hiking or walking. Landowners or managing agencies can weigh the risks of various trail uses and decide which uses to allow. Courts have reached divergent conclusions about what types of recreational activity are covered by recreational use statutes based on the text of particular statutes and the facts presented. Trail managers should take into account which recreational activities come within the scope of the relevant recreational use statute and develop trail use rules accordingly.

Information signs at trail entrances list prohibited, or permitted, types of trail uses. If a landowner provides access to a trail but the posted sign only identifies a single prohibited activity, the inference is that all other activities are permitted. If a posted sign permits only one activity, the inference is that all other activities are prohibited.

Trail managing agencies can minimize the possibility of damage or injury from more dangerous trail uses through prohibiting inherently dangerous uses such as motorized vehicle use, designing the trail away from known hazards, posting warning signs, erecting fences and barricades, and supervising the trail. Trail managing agencies have an obligation to remove known hazards on trails or warn of their presence. Where a hazard is highly dangerous, the trail section should be closed by warning signs that are visible under normal conditions from each direction of access. If the hazard is reparable, the trail managing agency should repair the trail while keeping the section involved 'closed' to use until repairs are completed.

Summary

Recreational use statutes are the primary legal framework addressing landowners' and land managers' responsibilities to those using their land. The statutes protect the landowner or trail management agency in case a recreational user is injured on the property or if the property is damaged due to vandalism or trespassing. Although the statutes differ by state, some common principles apply across jurisdictions.

Within these legal protections, the landowner is expected to take certain steps to mitigate risk to recreational users. While recreational use statues provide landowners with legal protections, they do not prevent lawsuits. To reduce exposure to lawsuits, landowners can undertake the following strategies: holding liability insurance, adhering to trail design and maintenance standards, posting appropriate signage, reducing known hazards, and planning for emergencies.

More Information

The following resources provide additional detail on recreational use statutes and related legal issues in all fifty states.

- The National Agricultural Law Center provides links to the statutory text for each state.
- The Recreational Aviation Foundation list provides links and a brief survey of the most important provisions in each state's statute.
- The American Whitewater list provides a side-by-side comparison to help landowners understand the differences between state recreational use statutes.
- Headwaters Economics has several other resources related to trails, including a searchable library of studies that have measured the benefits from trails

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About: Headwaters Economics is an independent, nonprofit research group that works to improve community development and land management decisions in the West.

Disclaimer: This memo is general in nature and does not constitute legal advice. Recreational use statutes and associated laws vary significantly from state to state in scope and content. Therefore, landowners and groups considering the possible liability that may be associated with trail development should consider the elements of the recreational use statute in their state.

Appendix B

State Laws Facilitating Pipeline/Utility Use of Highway Rights of Way

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Pipelines obtain the land they occupy through use of rights-of-way. A right-of-way is a contract that establishes a party's right to use and pass through land owned by another. Pipelines often exist concurrently with other infrastructure by using their existing rights-of-way, thus the commonality of seeing pipelines and power lines run alongside highways, neighborhood streets, train tracks, and other above-ground infrastructure components. Due to time constraints, we were unable to find relevant statutes and regulations for all states that allow the practice, but it does appear that many states provide for the installation of various types of utility and similar infrastructure along existing highway rights of way. Some examples of states that provide for this through their statutes and regulations are included below.

Colorado regulations, Section 2.3 *Permit Application Process, Obtaining a Permit* (11(f)), allow utilities to be placed within a highway right of way on a permanent easement, or if they are in public ownership, by agreement or conveyance to the state DOT. A utility permit is required for any utility work within a highway right of way, and the utility performing the installation is responsible for damage or other work needed on the highway in relation to the utility work.

Kansas' Utility Accommodation Policy, revised in 2020, allows for and regulates the installation of both aboveground and underground utility infrastructure, including pipelines and power lines.

North Dakota's Dept. of Transportation has published rules for accommodating utilities on state highway rights-of-way, including pipelines as well as overhead and underground power and communications lines. Regulations in Section IX also include requirements and limitations on the construction of utility and pipeline infrastructure when attached to highway structures like bridges.

Oklahoma Statutes Title 69 – Roads, Bridges, and Ferries includes regulations governing the installation of utilities and associated cables, pipelines, and related infrastructure along state highway rights-of-way (§69-1401 et seq.). Generally, any public utility lawfully operating or doing business in the state shall have the right to use the public roads and highways of the state, including the rights-of-way and all related easements, as provided for in §69-1401.

Texas' *Use of Right of Way by Others Manual* covers the rights and responsibilities of utilities and other entities who want to place energy infrastructure along highway rights of way.

By law, the Railroad Commission has responsibility to regulate the placement of all oil and gas lines within the state. Pipelines built within highway rights of way must also comply with federal safety standards found in 49 CFR part 192.

State regulations define utilities as “all private as well as public lines, including electric power transmission, electrical power service, telephone, television coaxial cable, water, gas, petroleum products, chemicals, steam, waste water and similar lines.” State law provides that certain utilities have a legal right to be placed on the highway rights of way. However, in some instances TxDOT may deny a request for the placement of certain utilities on highway right of way if it impedes highway use.

Virginia Statutes Title 56-10, Art. 5 governs pipelines and other utility works, allows any person who owns, furnishes or transports materials or services by means of a utility line to install such lines so long as they follow industry standards including the National Electric Safety Code, the state PUC’s pipeline safety regulations, the state Department of Health's waterworks regulations (12VAC5-590-10 et seq.), and standards established by the Utility Industry Coalition of Virginia. The PUC is in charge of developing rules for implementation and enforcement of this statute.

§ 56-258 allows the Commissioner of Highways and certain county governments to contract with water companies to install water pipelines along public roadways.

§ 56-259 allows corporations to contract with other entities to provide access to rights of way, and encourages the joint use of existing rights of way by utilities/public service corporations and other entities. For example, it allows a public service corporation to appeal a refusal by another corporation who owns a right-of-way to allow joint use to the PUC, and allows local governing bodies to request the PUC to direct a joint use of a right-of-way within that locality. This may help facilitate the installation of new utility lines or pipelines within any existing rights of way along highways or turnpikes.